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Nos. 28 and 29

IN THE

Supreme Court of the United States

OCTOBER TERM, 1952

UNITED STATES OF AMERICA, ON THE RELATION OF OSCAR L. CHAPMAN, SECRETARY OF THE INTERIOR,
Petitioner

v.

FEDERAL POWER COMMISSION, VIRGINIA ELECTRIC AND POWER COMPANY, *et al.*

VIRGINIA REA ASSOCIATION, *et al.*,
Petitioners

v.

FEDERAL POWER COMMISSION, VIRGINIA ELECTRIC AND POWER COMPANY, *et al.*

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR APPALACHIAN ELECTRIC POWER COMPANY, INTERVENOR

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Intervenor

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Opinions Below

The opinion of the Court of Appeals (V, 28-46) is reported at 191 F.2d 796. The opinion and order of the Federal Power Commission (I, 41-78) are not yet officially reported. The Chief Presiding Examiner's decision and

order (III, 1045-1106) and supplemental decision (III, 1107-1137) are not officially reported.[1]

Jurisdiction

The judgment of the Court of Appeals was rendered on October 1, 1951 (V, 46-7, 68). Petitions for rehearing filed on October 26 and 30, 1951 (V, 47, 69), were denied on November 5, 1951 (V, 64, 72). On January 29, 1952, by order of the C ef Justice of this Court, the time for filing petitions for writs of certiorari was extended to and including April 1, 1952 (V, 74-5). The petitions were filed within such time and were granted May 5, 1952 (VI, 71). The jurisdiction of this Court is invoked under Section 313 (b) of the Federal Power Act, but one of the questions presented relates to the standing of petitioners to invoke such jurisdiction.

Questions Presented

1. Whether petitioners have standing to invoke judicial review of the order of the Federal Power Commission ("Commission").

2. Whether the Commission's authority under the Federal Power Act to issue a license for the development by Virginia Electric and Power Company ("VEPCO") of a hydroelectric project on the Roanoke River at Roanoke Rapids, North Carolina, is precluded by those provisions of Section 10 of the Flood Control Act of 1944 which "approved" a general plan for the comprehensive development of the Roanoke River Basin but "authorized" Federal construction of only two projects (at Buggs Island and Philpott) of the 11 projects in the plan.

3. Whether the Commission is precluded from issuing such license by reason of its prior approval of the gen-

[1] The Roman numerals refer to volumes of the printed record. Referenees to the unprinted record, which the parties have stipulated may be referred to in the briefs (VI, 70), are given as "R. —".

eral plan for the comprehensive development of the Roanoke River Basin.

Statutes Involved

The statutes involved are the Federal Power Act (41 Stat. 1063, as amended, 16 U.S.C. 791a, *et seq.*) and certain provisions of the Flood Control Act of 1944 (58 Stat. 887). The Commission has submitted pamphlet copies of the Federal Power Act and has set forth pertinent provisions of the Flood Control Act of 1944 in the Appendix (pp. 33-6) of its brief in opposition to certiorari.

Statement

On October 6, 1948, VEPCO filed an application, under Section 4(e) of the Federal Power Act, seeking a license to construct and operate a hydroelectric project on the Roanoke River at Roanoke Rapids, North Carolina. Petitioners opposed the application. Appalachian Electric Power Company ("Appalachian") and Carolina Power and Light Company were permitted to intervene in support of the application. Extensive hearings were held. On March 17, 1950, the Chief Presiding Examiner recommended issuance of a license (III, 1045-1106). Petitioners then sought to offer what was asserted to be "newly discovered" evidence. The Commission permitted the reopening of the record and the introduction of further evidence (III, 1107). Further hearings were held. On November 15, 1950, the Examiner again recommended issuance of a license (III, 1107-1137). Petitioners filed exceptions and oral argument was heard by the Commission. On January 26, 1951, the Commission issued its findings, opinion and order, authorizing issuance of the license requested (I, 41-78). Petitioners' request for rehearing was denied on March 1, 1951.

Petitioners then sought review of the Commission's order in the Court of Appeals for the Fourth Circuit. After the filing of briefs and argument, the Court of Ap-

peals on October 1, 1951, denied the petitions (V, 29-46). Petitioners' request for rehearing was denied on November 5, 1951 (V, 64, 72). Thereafter, petitions for certiorari were filed in this Court and granted (VI, 71).

In the proceedings below, petitioners raised and urged detailed contentions not only relating to the Commission's jurisdiction, but covering almost every aspect of the merits of the application. All of these latter contentions now appear to have been abandoned. Apart from the standing of petitioners to invoke judicial review, the only remaining issue is whether the Commission had jurisdiction to consider and grant VEPCO's application.

Petitioners assert that the issuance by the Commission of a license for non-Federal development of a project at Roanoke Rapids is precluded by reason of (a) the "approval" by Congress, in the Flood Control Act of 1944, of a general plan for development of 11 sites in the Roanoke River Basin (including a site at Roanoke Rapids), although such Act "authorized" Federal development of only two such sites (Buggs Island and Philpott), and (b) the approval of such general plan expressed in the Commission's letter of May 3, 1944, to the Chief of Engineers, U.S. Army.

The language of the Flood Control Act of 1944 upon which petitioners rely is:

> "SEC. 10. That the following works of improvement for the benefit of navigation and the control of destructive flood waters and other purposes are hereby adopted and authorized in the interest of the national security and with a view toward providing an adequate reservoir of useful and worthy public works for the post-war construction program, to be prosecuted under the direction of the Secretary of War and supervision of the Chief of Engineers in accordance with the plans in the respective reports hereinafter designated and subject to the

conditions set forth therein: *Provided,* That the necessary plans, specifications, and preliminary work may be prosecuted on any project authorized in this Act to be constructed by the War Department during the war, with funds from appropriations heretofore or hereafter made for flood control, so as to be ready for rapid inauguration of a post-war program of construction: *Provided further,* That when the existing critical situation with respect to materials, equipment, and manpower no longer exists, and in any event not later than immediately following the cessation of hostilities in the present war, the projects herein shall be initiated as expeditiously and prosecuted as vigorously as may be consistent with budgetary requirements: *And provided further,* That penstocks and other similar facilities adapted to possible future use in the development of hydroelectric power shall be installed in any dam authorized in this Act for construction by the War Department when approved by the Secretary of War on the recommendation of the Chief of Engineers and the Federal Power Commission.

* * * * * *

ROANOKE RIVER BASIN

The general plan for the comprehensive development of the Roanoke River Basin for flood control and other purposes recommended by the Chief of Engineers in House Document Numbered 650, Seventy-eighth Congress, second session, is approved and the construction of the Buggs Island Reservoir on the Roanoke River in Virginia and North Carolina, and the Philpott Reservoir on the Smith River in Virginia, are hereby authorized substantially in accordance with the recommendations of the Chief of Engineers in that report at an estimated cost of $36,140,000."

Appalachian is an electric utility company furnishing service in an area which includes the western part of Virginia. A substantial portion of the Roanoke River Basin and certain of the damsites referred to in the general plan are located in the territory served by Appalachian. (See map facing V, 20 and Ex. 21). Appalachian now owns and operates hydroelectric projects and contemplates construction of additional projects in this area. Acceptance of the arguments urged by petitioners would foreclose future construction by anyone other than the Federal Government at the remaining 9 sites in the Roanoke River Basin and would therefore materially prejudice Appalachian's plans for the future. Accordingly, Appalachian sought and was granted the right to intervene before the Commission (V, 22-3) and the Court of Appeals (V, 27) and actively participated in such proceedings.[2]

Appalachian's position is that the issues presented were correctly decided by the Commission and the Court below. Its primary interest, however, relates to the broad issue of the Commission's jurisdiction. We shall, therefore, confine our discussion in this brief to the question whether the Commission had jurisdiction to consider and grant VEPCO's application for a license to develop the site at Roanoke Rapids.

Summary of Argument

A.

1. The VEPCO application is typical of the kind of project as to which Congress, by the express terms of the Federal Water Power Act, conferred jurisdiction upon the Commission. There is nothing in the Flood Control Act of 1944 which expressly precludes the jurisdiction of the Commission. At best, petitioners' contention

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[2] Statements in the brief of counsel for the Secretary of the Interior ("Interior") which purport to state or refer to the basis for Appalachian's interest in this matter are incomplete and misleading. (Compare Int. Br. 68-9, 88-9 with V, 19-20).

must rest on what they contend to be an implication in Section 10 of the 1944 Act, namely, that the licensing jurisdiction of the Commission has been withdrawn as to sites included in the approved general plan. Acceptance of such contention in this case would result in pre-empting for the Federal Government all of the 9 remaining worthwhile dam and reservoir sites in the Roanoke River Basin, those in the Savannah River Basin and a great many of the remaining economically feasible sites throughout much of the United States. Petitioners must sustain a heavy burden to support their interpretation that such *pro tanto* withdrawal and repeal by implication were intended in the 1944 Act.

Petitioners' contention necessarily assumes that Congress can lawfully authorize Federal development of a purely power project such as that at Roanoke Rapids. But there is at least a very substantial question whether Congress has any such constitutional authority. Acceptance of petitioners' interpretation would raise a substantial constitutional question, which can and should be avoided by its rejection.

2. "Adoption and authorization" in the introductory provisions of Section 10 refer only to the projects later listed, as "authorized" for Federal construction, in the substantive text of Section 10. Otherwise the subsequent use of "authorize" or "authorized", in the introductory provisos of Section 10 and in the later substantive text, would have been superfluous. There would have been no need or reason for specific "authorization" of Buggs Island and Philpott or for returning to Congress, as has been done, for the sole purpose of obtaining authorization of Federal construction of other projects which are part of approved general plans for the Roanoke River and other Basins. The fact that certain of the introductory provisions of Section 10 are so obviously inapplicable to the Roanoke Rapids project affords further proof that Roanoke

Rapids was not "adopted" or "authorized" for Federal construction.

"Authorization" of specifically named projects and "approval" of a general plan in the same sentence of the Roanoke River Basin provision of Section 10 were obviously meant to have different meanings and significance. The former was intended to authorize both Federal construction of and also appropriations for the projects specifically named. The latter was intended merely to sanction or give approval to the physical features of the general plan and to insure that non-Federal construction or subsequently authorized Federal construction would "fit into" the approved general plan.

As appears clearly from examination of the legislative enactments in respect of Federal public works, particularly flood control improvements, the terminology of Section 10 of the 1944 Act is entirely consistent with the Commission's interpretation thereof.

Clearly also, subsequent actions in Congress, in respect of specific non-"authorized" projects included in the Roanoke River Basin plan and the Savannah River Basin plan, are completely consistent with the language of the Roanoke River Basin provision and the precisely parallel language of the Savannah River Basin provision in the 1944 Act. In each instance it has been considered essential that, if projects other than those specifically named and "authorized" in the 1944 Act are to be constructed by the Federal Government, there must be further legislation for the express purpose of "authorizing" such Federal construction.

Petitioners' argument, that Congress intended to commit itself to Federal construction of all 11 dams in the general plan as a "single project" or "single package", rests on the premise that Congress was primarily concerned with the general plan as a single "project" rather than with the authorization of individual "dams" or

"reservoirs" included in the plan. The invalidity of this premise is clearly shown by the text as well as by the legislative history of the 1944 Act. Other statutory provisions upon which petitioners rely to support this argument contain express limitations (omitted in petitioners' paraphrase) which show their inapplicability.

Non-Federal development at Roanoke Rapids will not interfere with the economics of Buggs Island or Philpott or the general plan, or with any physical aspect or the operation of the two Federally authorized projects or of the plan as a whole. The Chief of Engineers has reported that the VEPCO project is consistent with the Congressionally approved comprehensive plan for development of the water resources of the Basin and the Commission has found, on the record, that the VEPCO project "is in harmony with the approved comprehensive plan and is 'best adapted to a comprehensive plan' as that language is used in Section 10(a) of the Federal Power Act". (I, 68).

The legislative history shows that Congress intended a substantial distinction between the "authorization" of specifically named projects and mere "approval" of the physical aspects of a general plan; that Congress authorized Federal construction of only Buggs Island and Philpott; that Congress intended that Federal construction should be confined to dams and reservoirs primarily for flood control and should not include purely power projects like Roanoke Rapids; and that, in particular, Congress had no intention of precluding the Commission from considering an application for non-Federal development of a power project at Roanoke Rapids. This preoccupation with flood control and intention not to authorize dams or reservoirs which are merely for power purposes is not only evident in prior flood control legislation (Sen. Rep. No. 1963, 74th Cong., 2nd Sess., p. 2; H.R. Rep. No. 2353, 75th Cong., 3rd Sess., pp. 5-6), but also appears in the House Committee report on the 1944 Act (H.R. Rep. No. 1309, 78th Cong., 2nd Sess., pp. 1-4), in statements on the floor of the House (90

Cong. Rec. 4199, 4202) and in the Senate hearings (Hearings on H.R. 4485, 78th Cong., 2nd Sess., pp. 29-30). The Senate Committee report makes it entirely clear that the only Federal "projects added" by the Roanoke River Basin provision were Buggs Island and Philpott (Sen. Rep. No. 1030, 78th Cong., 2nd Sess., pp. 29-30). The Corps of Engineers, who were most directly concerned, who presented the legislation to Congress and discussed it in the hearings, have stated time after time that Congress authorized Federal construction only of Buggs Island and Philpott and never meant to preclude non-Federal development of Roanoke Rapids under the Federal Power Act. (III, 1065 *et seq.*).

The general plan of development approved by Congress was the plan recommended by the Chief of Engineers in House Document 650. Such plan was submitted in response to the specific request by Congress for a "review" of House Document 65, 74th Cong., 1st Sess., the Corps of Engineers' original "308" report on the Basin. The major purpose of the "308" reports was stated in House Document 308, 69th Cong., 1st Sess., to be the preparation of general plans for river improvement to be undertaken by the Federal Government, either alone or "in connection with private enterprise", or "to secure adequate data to insure that waterway developments by private enterprise would fit into a general plan for the full utilization of the water resources of a stream". (at p. 4). It is thus clear that the Corps of Engineers' report was primarily concerned with the physical aspects of the general plan for the Roanoke River Basin and that, in approving such general plan, Congress merely intended to approve its physical aspects and to "insure that waterway developments by private enterprise would fit into a general plan for the full utilization of the water resources" of the stream. Both the Chief of Engineers and the Commission have specifically found that the VEPCO project is in harmony with the approved comprehensive general plan. (Ex. 8, I, 191; I, 68).

B.

1. The Commissio 's letter of May 3, 1944, commenting on the Corps of Engineers' plan, was concerned only with the plan in the physical sense and not with who should construct the projects in the plan. The Commission has so regarded it and is obviously the best judge of what it meant in its own letter.

2. Apart from that question, a conclusive finding under Section 7(b) can be made only in connection with consideration of an application for a license and only after a hearing at which the applicant and interested parties are afforded an opportunity to present evidence and argument. Such procedure, which was followed in this case, protects the interests of both the United States and the applicant. The Commission's determination in this case has been based on a record in which this issue has been thoroughly explored and the Commission has found, on all the evidence, that there is no basis for a judgment or finding that development of Roanoke Rapids should be undertaken by the United States. While petitioners challenged the Commission's views as to the meaning and effect of the May 3, 1944 letter and interpretation of Section 7(b), they made no attempt in the Court of Appeals to argue that the evidence introduced at the hearings required a finding contrary to that made by the Commission.

C.

1. The evidence is overwhelming, and the Commission has specifically found, that the only benefit which Federal development at Buggs Island could contribute to Roanoke Rapids would be to make possible an increase in energy output, with an annual value of about $250,000. In accordance with the requirements of the Federal Power Act, the Commission has indicated that it will require VEPCO to compensate the United States for any such contribution.

2. VEPCO's development of Roanoke Rapids will not deprive the United States of any power benefits whatever, and will not lessen the power benefits of the general plan. The excess of power benefits over costs to which petitioners refer, results primarily from the fact that such "costs" are calculated on the basis of Federal operation (without payment of any Federal or local taxes and assuming the furnishing of all capital in the form of 100% debt at a rate of 2%). The "benefits", however, are taken as equivalent to the cost of power produced at a privately financed and operated steam plant (including very substantial costs for Federal and local taxes and assuming an over-all cost of money of 6%). In addition, such excess includes the value which may be contributed to the Roanoke Rapids project by the Buggs Island reservoir and the value derived from the true economic advantage of hydro development at Roanoke Rapids over a steam plant designed to produce the same capacity and energy.

Under Federal development, the United States Treasury will realize no benefits whatever, but will pass on to the consumers (of the Federal project's output) the amounts represented by the difference between the costs incurred in respect of taxes, capital charges and headwater benefit payments under Federal development as against those under VEPCO development. Under VEPCO development, the United States Treasury (and, in the case of taxes, the State and other local governments) will actually *receive* (or, in the case of the cost of capital, *save*) the amounts represented by this difference. In each case, the true economic advantage of Roanoke Rapids hydro will be passed on to the consumer. The real over-all benefits and costs are the same under either form of development.

3. VEPCO's development of Roanoke Rapids will, in fact, further the public interest and general welfare. Such development can be permitted only after consideration of and compliance with standards which under the Federal Power Act have been designed to protect and further every

relevant aspect of the public interest. The Act provides for continuing jurisdiction and supervision to ensure the continued protection of such interest.

All parties agree that the early development of these water resources is highly desirable. VEPCO is ready, willing and able to proceed with such development immediately under the requirements and regulation of the Federal Power Act. The alternative suggested is Federal construction which may never be authorized or which, if it were ever authorized, might never take place.

VEPCO's development of Roanoke Rapids would accord with the national policy, reflected in the Federal Power Act, to encourage hydroelectric development by "private capital and enterprise" (Sen. Rep. No. 180, 66th Cong., 1st Sess., p. 3). Such private development will contribute to the national interest not only in the development of the particular project, but also in conserving Federal funds, which will then be available for some water project or other purpose which otherwise might never be built or served.

ARGUMENT

The Commission Had Jurisdiction to Consider and Grant the VEPCO Application

A. THE COMMISSION'S AUTHORITY UNDER THE FEDERAL POWER ACT TO ISSUE A LICENSE FOR VEPCO'S PROPOSED DEVELOPMENT OF A HYDROELECTRIC PROJECT AT ROANOKE RAPIDS WAS IN NO WAY PRECLUDED BY THE PROVISIONS OF SECTION 10 OF THE FLOOD CONTROL ACT OF 1944.

1. The Issue Presented and the Applicable Principles of Statutory Construction.

a. The question at issue is whether the 1944 Act represents a pro tanto withdrawal and repeal by implication of the broad grant of authority in the Federal Power Act.

It is important at the outset to define this issue in its proper context. Part I of the Federal Power Act (the Federal Water Power Act) is the basic statute setting forth the standards governing the development of hydroelectric projects on navigable streams. It confers broad jurisdiction on the Commission to consider and grant applications for licenses for such development. It is clear (and no assertion has been or could reasonably be made to the contrary) that, in so far as the Federal Power Act itself is concerned, the VEPCO application is typical of the kind of project (in navigable waters) as to which the Congress, by the express terms of the Act, conferred jurisdiction upon the Commission. Petitioners contend, however, that Congressional approval, in Section 10 of the Flood Control Act of 1944, of a general plan of the Corps of Engineers relating to the Roanoke River Basin was intended to deprive the Commission of such jurisdiction.

There is, of course, nothing in the 1944 Act which expressly precludes the jurisdiction of the Commission. At best, petitioners' contention must rest on what they consider to be an *implication* in Section 10 that the licensing jurisdiction, conferred by the Federal Power Act on the Commission, was withdrawn as to sites included in the approved general plan for the Roanoke River Basin. The issue presented is, therefore, whether the 1944 Act represents a *pro tanto* withdrawal by implication of the broad grant of authority in the Federal Power Act.

It is important to note the scope and significance of such withdrawal by implication. For, if the contentions of petitioners in this respect are accepted—and are found to be equally applicable in other areas—it will mean that, without further hearings or further consideration of applications for licenses, States, municipalities, citizens and corporations will be foreclosed from development of hydroelectric projects, not only at all of the 9 remaining worthwhile dam and reservoir sites in the Roanoke River Basin, but at all of the remaining worthwhile sites of the 11 in the

Savannah River Basin—and at a great many of the remaining economically feasible sites throughout much of the United States.

In this light, such withdrawal by implication would constitute repeal of the licensing provisions of the Federal Power Act in respect of all such sites. The practical effect would be largely to eliminate in the future any State, municipal or private construction of projects for the development of hydroelectric power.

b. **Petitioners must sustain a heavy burden to support their interpretation that Congress intended such repeal by implication.**

It is, of course, a well recognized principle of statutory construction that repeal by implication is not to be assumed unless the evidence is overwhelming that such repeal was intended. Therefore petitioners must sustain a heavy burden to support their contention.

This is particularly true where, as here, there is concrete evidence that, when Congress really desired to deny the Commission jurisdiction, it has done so by express language to that effect. For example, when Congress, in providing in the Boulder Canyon Project Act for certain Federal development of the Colorado River, desired to foreclose Commission jurisdiction, it expressed its intention in unmistakable terms by stating:

> "The Federal Power Commission is hereby directed not to issue or approve any permits or licenses under said Federal Water Power Act upon or affecting the Colorado River or any of its tributaries . . .". (45 Stat. 1057, 1062).[3]

c. **Acceptance of petitioners' interpretation would raise a substantial constitutional question which,**

[3] Congress has used similar express language in prohibiting the granting of licenses to construct projects in the Potomac River Basin. 45 Stat. 1012.

by the rejection of that interpretation, can and should be avoided.

It must also be borne in mind that petitioners' contention, as to the meaning of Congressional approval of the general plan for the Roanoke River Basin, necessarily assumes that Congress can lawfully authorize Federal development of such a project as that at Roanoke Rapids—*a project which has no flood control or navigation function at all but has as its sole purpose the generation of hydroelectric power for sale to the public.* (see Ex. 1, Table 36, I, 158-9; IV, 140; R. 575, 749, 756; and see the Commission's findings, I, 44, 51, 53-4).

Since the constitutional question has not been expressly dealt with by the Commission or the Court below and since the case has not been developed in a context in which the constitutional question has been presented directly, we do not think it appropriate to argue that question—an argument which would involve consideration of all clauses of the Constitution which might conceivably be thought to be involved. However, we point out that Federal development of hydroelectric power for sale to the public has been upheld only where the water power has been found to be an "inevitable incident" (see *Ashwander* v. *Tennessee Valley Authority*, 297 U.S. 288, at 330 (1936)) of the construction of a dam in some proper exercise of constitutional authority, e.g., the regulation of interstate commerce through navigation or flood control improvements.

In the *Ashwander* case, this Court found that, in addition to its objective of national defense, the National Defense Act of 1916 had in view "improvements to navigation", so that the construction of the dam and power plant under consideration were "an appropriate means to accomplish a legitimate end"—that of improving navigation under the authority of the Commerce Clause (at pp. 328-30). The Court therefore held that "The Wilson Dam and its power plant must be taken to have been constructed in the

exercise of the constitutional functions of the Federal Government" (at p. 330).

But the Court specifically pointed out (at p. 340):

> "the Government rightly conceded at the bar, in substance, that it was without constitutional authority to acquire or dispose of such energy except as it comes into being in the operation of works constructed in the exercise of some power delegated to the United States."[4]

In the case of the Roanoke Rapids project, the development of power is the sole function and the power is not to be used by the United States. Therefore, the creation of the power would not be incidental, let alone inevitably incidental, to the construction of the dam for some constitutionally authorized function of the Federal Government.

If the interpretation urged by petitioners as to the significance of Congressional approval of the general plan for the Roanoke River Basin were accepted, the constitutional question would be raised. It will be completely avoided if petitioners' interpretation is rejected.

Unless the contrary clearly appears, recognized principles of statutory construction require an interpretation which will avoid a substantial constitutional question.

2. Congressional "Approval" of a General Plan for Development of the Roanoke River Basin was not Intended to and did not Divest the Commission of Jurisdiction to Grant the VEPCO Application.

a. Petitioners' argument overlooks the clear and significant distinction between Congressional "authorization" of a specific project and "approval" by Congress of a general plan.

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[4] In our discussion below of the legislative history of the Flood Control Act of 1944, we advert to doubts expressed in the Senate hearings as to the Congressional authority to authorize Federal construction of a purely power project. See p. 41, *infra*.

Petitioners' argument in this phase of the case is not always easy to follow. It does appear, however, to rest on three major premises. First, that the Federal Government is deemed to have entered upon a project when the project is "adopted by law". Second, that either Federal construction of all 11 dams in the Roanoke River Basin was "adopted and authorized" by virtue of the introductory provisions of Section 10 of the Flood Control Act of 1944 or the terms "authorize" and "approve", as used in the subsequent paragraph relating specifically to that Basin, have a common meaning and significance—presumably equivalent to the term "adopted". Third, that the 11 dams referred to in the general plan represent a "single project" or "single package" and that, while specifically "authorizing" construction only of the dams at Buggs Island and Philpott, Congress intended to commit the Federal Government to construct all 11 dams in the "single project" or "single package".

(1). If Federal construction of the Roanoke Rapids project was not in fact "adopted by law", the Federal Government cannot be deemed to have entered upon that project.

The important point to observe in connection with petitioners' first premise—i.e. that the Federal Government should be deemed to have entered upon a project when it is "adopted by law"—is that it is taken from an often repeated statutory provision which specifically provides that the Federal Government shall *not* be deemed to have entered upon any project *until* it is "adopted by law". (See Int. Br. p. 101). *Therefore, unless petitioners can demonstrate that Federal construction of the Roanoke Rapids dam was actually "adopted by law", the Federal Government cannot be deemed to have entered upon that project nor to have precluded its development by a non-Federal applicant under the licensing provisions of the Federal Power Act.*

(2). Neither the introductory provisions of Section 10 nor the "approval" of the general plan represent an "adoption" or "authorization" of Federal construction of the Roanoke Rapids project.

The second premise of petitioners is that either all 11 dams were "adopted and authorized" by virtue of the introductory provisions of Section 10, or that the terms "authorize" and "approve" have a common significance and meaning—presumably equivalent to the term "adopted".

(a.) *"Adoption and authorization" in the introductory provisions of Section 10 refer only to the projects listed in the succeeding paragraphs of Section 10 as being authorized for Federal construction.*

Petitioners lay great stress on the use of the term "adopted and authorized" which appears in the introductory portion of Section 10. It is argued that such language proves that the Roanoke Rapids project was adopted and authorized for construction by the United States.

But it is obvious that the quoted language refers and is applicable only to the projects later listed as "authorized" in the various subdivisions of Section 10.[5] Otherwise, the subsequent use of the words "authorized in this Act to be constructed"; "authorized in this Act for construction", etc., in the introductory provisos of Section 10 and in the later subdivisions would have been wholly superfluous—and there would have been no need or reason for the specific "authorization" of such projects as Buggs Island and Philpott.

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[5] What the introductory language of Section 10 means is that those "works of improvement" (the words "general plans" do not appear here) which subsequently in the Act are "authorized" for Federal construction are "hereby adopted and authorized in the interest of the national security and with a view toward providing an adequate reservoir of useful and worthy public works for the post-war construction program, to be prosecuted under the direction of the Secretary of War and supervision of the Chief of Engineers. . . ."

Further, if petitioners' argument in this respect were valid, there would be no need to obtain further "authorization" for any project in any general plan "approved" in Section 10. Yet, as shown below (pp. 27-29), it has been considered necessary to obtain such authorization by subsequent legislation.

Petitioners also refer to other provisions in the introductory portion of Section 10, which, it is argued, indicate that the Roanoke Rapids project was intended "to be constructed with funds of the United States, hence by and for the United States, and not by and for anyone else". (Int. Br. p. 148). But, here again, the reference to "any project authorized in this Act" (in the first proviso of the introductory provisions) and the reference (in the last proviso) to "any dam authorized in this Act" show that such provisions are applicable only to projects which are actually "authorized" for Federal construction in the later subdivisions of Section 10.

In this connection, it should be noted that, whereas petitioners' paraphrase of the second proviso (Int. Br. p. 109) would have it that the projects referred to therein are *all of the projects enumerated* in Section 10 and "not merely those authorized to be constructed", yet clearly the antecedent of the words "projects herein" in that second proviso consists of the words of the preceding proviso, "any project *authorized* in this Act to be constructed". (Emphasis added.)

Further, we suggest that the introductory provisions of Section 10 referred to by petitioners, since they so obviously have no applicability to the Roanoke Rapids project, afford affirmative proof that Roanoke Rapids was *not* "authorized" or "adopted" for Federal construction. Thus, no "plans, specifications or preliminary work" with respect to the Roanoke Rapids project have been prosecuted "with funds from appropriations heretofore or hereafter made for flood control, so as to be ready for rapid inauguration of a post-war program of construction." Indeed, the Corps of Engineers' Report, itself (which, petitioners

argue, was in effect adopted verbatim by Congress), did not urge immediate construction of the Roanoke Rapids project, but specifically recommended that it be constructed only "when warranted by the need for additional generating facilities in the area" (Ex. 1, p. 10, I, 149). Yet the introductory provisions of Section 10 state that projects to which such provisions apply "shall be initiated as expeditiously and prosecuted as vigorously as may be consistent with budgetary requirements" and in any event not later than "immediately following the cessation of hostilities in the present war". *And the actual facts as to Roanoke Rapids are that, as of now, eight years after the 1944 Act and seven years after "the cessation of hostilities", no steps have been taken by the Federal Government to construct the Roanoke Rapids project, there is not even legislation pending before Congress for that purpose and the more recent efforts made by the Secretary of the Interior to obtain Congressional authorization for its development were unsuccessful.*[6]

(b.) *The "authorization" of specifically named projects and the "approval" of a general plan, in the Roanoke River Basin provision of Section 10, were obviously meant to have different meanings and significance.*

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[6] At oral argument before the Commission on January 11, 1951, the following questions were put by the Chairman and the following answers given by counsel for Interior:

"THE CHAIRMAN: I would like to ask another question as we go along here. Do you know whether or not the Department of Interior has any plan to submit to Congress a request for an authorization for development of Roanoke Rapids?

MR. HANKIN: On January 7, 1949, the Secretary of the Interior asked the Secretary of the Army to ask the Congress for authorization of appropriations to proceed with the further plans.

THE CHAIRMAN: Was that done?

MR. HANKIN: That was done on January 7, 1949.

THE CHAIRMAN: What happened to it?

MR. HANKIN: Nothing further than that has been done about it."

(R. 3673-4).

Petitioners then come to the point which, though presented as an alternative argument, is, in reality, the heart of their contention. Petitioners argue that the words "approved" and "authorized" in Section 10 of the 1944 Act are synonymous in their meaning and significance and that Congress meant to authorize construction by the Federal Government of all of the 11 projects in the general plan. The most obvious answer to this argument is that Congress —in "approving" the general plan and "authorizing" Federal construction of only Buggs Island and Philpott— used in the same sentence two different words in such context that manifestly it must have intended that different significance be attached to the respective terms.

It is clear that "authorization" of Federal construction of a project together with the appropriation of funds and the commencement of construction will preclude the Commission from issuing a license for non-Federal development of such project. *Savannah River Electric Co.* v. *Federal Power Commission*, 164 F. 2d 408 (C.A. 4th, 1947). In that case the Court noted that the Clark Hill project, there involved, was an "authorized" project; emphasized the evidence showing that Congress had made several appropriations for the project and that Federal construction had already begun; and concluded that the case was one where "Congress had expressly taken over" the project "for the United States and upon which work was going forward under appropriations made by Congress." *Id.* at p. 411.

Even if it be assumed, *arguendo*, that Congress intended a like result where it has gone no further than to "authorize" construction of a specific project (with neither actual construction nor appropriation), it remains clear beyond any question that the distinction in this respect, between "authorization" of specific named projects and mere "approval" of a general plan embodying those projects among others, was not fortuitous and that it was intended by Congress to be a distinction with a substantial difference,

The references by petitioners to a few inconsistent uses of the pertinent terms in other provisions of the 1944 Act or in other legislation obviously represent an attempt to get away from the salient and directly pertinent fact that, in the single sentence of Section 10 of the 1944 Act which deals with the Roanoke River Basin projects, there appear the words "approved" and "authorized" in such context as clearly to show that these words were not intended to be synonymous.

As we point out at greater length below (pp. 43-45), Congressional "approval" of a general plan for comprehensive development means a sanctioning of the physical features of the plan as being appropriate for such development. Such "approval" does not connote an adoption of the plan for construction by the Federal Government; it does, however, make it possible to insure that non-Federal construction (or subsequently authorized Federal construction) will "fit into" the approved general plan. (See House Doc. 308, 69th Cong., 1st Sess., at p. 4, which is quoted at greater length at p. 44, *infra*).

In addition to the legislative history (discussed below, pp. 35-43), there is further concrete evidence supporting these conclusions.

(c.) *The terminology of Section 10 of the 1944 Act is entirely consistent with the Commission's interpretation thereof.*

The terminology pertinent to Congressional action in respect of Federal public works, particularly rivers and harbors and flood control improvements, varies and in some instances has been inconsistent. This is true of the terminology in the legislative enactments and is at least as true of that used by members of Congress in committee or on the floor. It is, therefore, not particularly helpful, nor does it lend any support to petitioners' contentions, to search diligently, as petitioners have, and to find, in the legislative enactments, occasional uses of words in meanings which are inconsistent.

It is clear, nevertheless, that the words "authorize" or "authorization", as used in respect of such public works, have definite meanings even though in this respect they are used in two different senses.

In the one sense, these words are used to signify the authorization of construction of a given project, or some modification thereof, as a matter of policy. Authorization in this sense is practically always coupled with a prescription as to the physical characteristics of what is so authorized—most frequently by reference to an official document comprising a report of the Chief of Engineers descriptive of and recommending the project. Of such use of these words one could cite a multitude of examples, such as:

The official caption of the 1944 Act itself, reading:

> "an Act authorizing the construction of certain public works on rivers and harbors for flood control, and for other purposes."

In the 1944 Act, Sec. 10, at the end of the specific enactment concerning "Connecticut River Basin", the proviso reading that:

> "neither this authorization nor any previous authorization shall be construed to authorize the construction of a dam or reservoir at the Sugar Hill site on the Ammonoosuc River."

That declaration of policy which appears regularly in flood control (authorization) acts beginning with that of 1946, Section 2, to-wit:

> "No project or any modification not authorized, of a project for flood control or rivers and harbors shall be authorized by the Congress unless a report for such project or modification has been previously submitted by the Chief of Engineers, United States Army, in conformity with existing law."

In the other sense, the words "authorized" and "authorization" are used as giving legal sanction to the subsequent making of appropriations by Congress for the specified projects and, almost without exception, in stated amounts. Of such use, likewise, one could cite a multitude of examples, such as:

> In the 1944 Act, Section 10, in the first paragraph of the specific enactments relating to "Lower Mississippi River", the provision that:
>
> > "there is hereby authorized to be appropriated, in addition to the sums previously authorized, $200,000,000 for the accomplishment of the purposes set forth in said document".
>
> To the same effect, in the same act and section, under "Sacramento River" the provision that:
>
> > "in addition to previous authorizations there is hereby authorized to be appropriated the sum of $15,000,000 for the prosecution of the modified projects".

In some instances, the words "authorized" or "authorization" are used in each of the two senses. Section 10 of the 1944 Act is replete with illustrations, of which the specific enactment concerning the Roanoke River Basin is one. It reads:

> "* * * the construction of the Buggs Island Reservoir on the Roanoke River in Virginia and North Carolina, and the Philpott Reservoir on the Smith River in Virginia, are hereby authorized substantially in accordance with the recommendations of the Chief of Engineers in that report [House Document Numbered 650] at an estimated cost of $36,140,000."

It is to be noted that the use of "authorized" in the first sense is here spelled out more clearly than is the use of the word in its second sense. The use as well in the second sense is implied by the appending of the clause "at

an estimated cost of $36,140,000" (which implication is clearly considered adequate for the purpose, for in the cases of neither these nor like projects has there been any more specific "authorization of appropriations").

In this connection, it may be noted that the enactment regarding the Savannah River Basin, in the second paragraph following that regarding the Roanoke River Basin, uses precisely parallel language. And in the Flood Control Act of 1950, Section 204, reference to this 1944 enactment regarding the Savannah River Basin appears in the words "in addition to the authorization for project construction in the Act of December 22, 1944".

Clearly, nothing less than "authorization of construction" can meet the requirement which regularly appears in flood control and rivers and harbors act provisions for the making of preliminary examinations and surveys (as, for instance, in Section 11 of the Flood Control Act of 1944 and Section 204 of the Act of 1948), in the words providing:

> "That the Government shall not be deemed to have entered upon any project for the improvement of any waterway or harbor mentioned in this Act until the project for the proposed work shall have been adopted by law."

What, if anything, further is needed to meet that requirement is not here in issue. Certain it is, however, that mere "approval" of a "general *plan* for the comprehensive development of the Roanoke River Basin", and the similar language in the case of the Savannah River Basin, is not sufficient to meet that requirement. Petitioners cannot bolster their contention by selecting fine shades of meanings out of a dictionary; for the definitions quoted in Interior's brief (pp. 149-150), particularly in the light of the parts of those definitions which are not quoted, do not indicate in the least that "authorize" is a standard or accepted synonym of "approve" or that the words "have a common connotation".

To be sure the Chief of Engineers in his report (House Doc. 650, 78th Cong., 2nd Sess.) recommended "that the *general plan* of development outlined in the report of the district engineer be *adopted* as the *basis of improvement.*" But Congress either disagreed or at least was more circumspect in its terminology and merely "*approved*" the "general plan for comprehensive development". (Emphasis added.) This distinction does not appear to be explained or even recognized in Interior's brief (pp. 105-6) or REA Association's brief (p. 11). In this connection, too, comparison is invited with the pertinent, but incorrect, paraphrasing in the second of Interior's Questions Presented (Int. Br. p. 3).

In the present instance, the terminology and specific provisions regarding the Roanoke River Basin plan and two of the projects comprised therein are clear and consistent of and within themselves and with the Commission's interpretation thereof. Plainly, the paragraph in point not merely makes a distinction between "the general plan for the comprehensive development" of the basin and "the construction of the Buggs Island Reservoir * * * and the Philpott Reservoir", but also it recognizes and refers to the recommendations of the Chief of Engineers in two correspondingly different, but perfectly consistent, aspects. Thus, in connection with the "approval" the reference is to the "general plan * * * recommended by the Chief of Engineers in House Document Numbered 650" while in connection with the "authorization" the reference is to "the construction [of the two reservoirs] * * * substantially in accordance with the recommendations of the Chief of Engineers in that report."

(d.) *Subsequent actions by Congress support the Commission's interpretation.*

Moreover, the actions taken by Congress subsequently as regards a specific non-"authorized" project comprised in the Roanoke River Basin plan and with regard to a specific non-"authorized" project comprised in the Savannah

River Basin plan are precisely consistent with the clear language of the two pertinent paragraphs of the 1944 Act and the Commission's interpretation thereof.

If petitioners were correct in their argument that all projects comprised in the Roanoke River Basin general plan had been authorized for construction by the Federal Government, there would, of course, be no need to return to Congress except to obtain appropriations as they might be needed. However, the fact is (and it is a fact which petitioners have never been able to explain satisfactorily) that it was considered necessary to introduce legislation in the 1949 session of Congress (see H.R. 3250 and 3416) for the sole purpose of "authorizing" Federal construction of the Smith Mountain project—which, like Roanoke Rapids, is one of the 11 projects included in the "approved" general plan for the Roanoke River Basin.[7] The House Committee on Public Works (successor to the Committee on Flood Control) held extensive hearings on these bills, this despite the fact that, on petitioners' theory that the project had already been adopted or authorized for Federal construction, such hearings would have been a complete waste of time. See Hearings on H.R. 5472 before the House Committee on Public Works, 81st Cong., 1st Sess., pp. 135 *et seq.*

The introduction of those bills and the holding of those hearings constitute an obvious recognition of the fact that

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[7] H.R. 3416 provided:

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Smith Mountain Dam and hydroelectric power plant project on the Roanoke River in Virginia, a unit of the general plan for the comprehensive development of the Roanoke River Basin for flood control and other purposes as approved by the Act of December 22, 1944, entitled 'An Act authorizing the construction of certain public works on rivers and harbors for flood control, and for other purposes', is hereby authorized substantially in accordance with the recommendations of the Chief of Engineers in House Document Numbered 650, Seventy-eighth Congress, at an estimated cost of $22,000,000."

"adoption and authorization" of the Smith Mountain project did not result from the 1944 "approval" of the general plan. Not once in the course of the hearings did anyone suggest that Smith Mountain had already been "authorized". From the legislative standpoint the Roanoke Rapids project is, of course, in exactly the same situation as Smith Mountain.[8]

Even stronger evidence to the same effect is to be found in the more recent Congressional authorization for Federal construction of the Hartwell project. The 1944 Act—in language precisely paralleling that used in respect of the Roanoke River Basin—approved a general plan, comprising likewise 11 projects, for development of the Savannah River Basin and authorized Federal construction of a project at Clark Hill. If petitioners' argument were valid, there would have been no need to secure further authorization for Federal construction of any of the ten other projects covered by the Savannah River Basin plan. Yet Congress deemed it necessary, in Section 204 of the Flood Control Act of 1950 (64 Stat. 170), to enact legislation for the sole and express purpose of authorizing Federal construction of the Hartwell project—being one of the ten others included in the "approved" general plan for the Savannah River Basin. Petitioners' only explanation for these facts is that "There was good reason for authorizing Hartwell, because * * * Hartwell is the next step in the development of that comprehensive plan, as approved by Congress * * *" (Int. Br. p. 131).

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[8] Petitioners' attempted explanation of the Smith Mountain bills and hearings (Int. Br. pp. 131-2) has elements of ingenuity but no foundation in fact. Plainly these bills were submitted because the Corps of Engineers, the sponsors of the bills and the Committee holding the hearings on the bills all were convinced that Smith Mountain had not been authorized in the 1944 Act and that such authorization was a necessary prerequisite to Federal construction. Further, it is perfectly clear that the reason such bills were not reported out of the House Committee was that the Committee was unwilling to recommend to Congress that it adopt and authorize the Smith Mountain project for construction.

(3). There is nothing in the applicable statutory provisions or legislative history which lends any support to petitioners' argument that Congress intended to authorize or commit itself to Federal construction of all 11 dams as a "single project" or "single package".

Petitioners next argue that all 11 dams in the general plan constitute only a "single project" or "single package"; and that Congress, while specifically "authorizing" Federal construction of only Buggs Island and Philpott, intended to "adopt by law" and commit itself to Federal construction of all 11 dams. Along with this contention, petitioners assert that non-Federal development of Roanoke Rapids will adversely affect the Federal projects at Buggs Island and Philpott and the general plan of development.

To begin with, it is important to point out that this so-called "single package" argument rests on petitioners' preliminary but unfounded assertion that in the history and nomenclature of flood control legislation Congress has been primarily concerned with the development of a river basin as a single "project" rather than with individual "dams" or "reservoirs" included in the single "project". We submit that, in so far as the Flood Control Act of 1944 is concerned, the legislative history of that Act, which time after time shows the concern of Congress with individual "dams" and "reservoirs" (see pp. 35-43, *infra*), demonstrates this basic hypothesis of petitioners to be wholly invalid and eliminates the major foundation of petitioners' contention.[9]

Petitioners attempt to find support for their contention in (1) what they refer to as a declaration of policy in

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[9] Moreover, petitioners' contention, that "project" means an entire comprehensive river basin development as covered by a general plan, is also belied by the fact that, in the terminology of the Army Engineers (see, e.g., par. 5 of the report of Chief of Engineers and Table 34 of House Doc. 650 (Ex 1, I, 137-8, 154-5)) and of Congress (see, e.g., Federal Power Act, Sec. 3(11) and Flood Control Act of 1941, Sec. 2 as concerns White River Basin), a comprehensive plan of development is comprised of projects.

the Flood Control Act of 1936, "that the Federal Government should improve or participate in the improvement of navigable waters and their tributaries, including the watersheds thereof, 'if the benefits to whomsoever they may accrue are in excess of the estimated costs, and if the lives and social security of people are otherwise adversely affected', 33 U.S.C. 701a (App. p. 3)" (Int. Br. p. 172); and (2) the provision "that investigations and improvements 'for flood control and allied purposes' shall be under the jurisdiction of and shall be prosecuted by the War Department" and that in making his reports "the Secretary of War, in the determination of the Federal interests involved, shall be guided by the principle enunciated; namely, that if the benefits would exceed the estimated costs, or if the lives and social security of people are otherwise affected, he should recommend that the improvements be undertaken by the Federal Government, 33 U.S.C. 701 b (App. p. 5)." (Int. Br. p. 172).

As paraphrased and quoted in Interior's brief, these provisions might conceivably lend support to petitioners' argument. But, in each case, the paraphrase and quotation omit the important words of limitation which show that these provisions mean something quite different.

Thus, an examination of 33 U.S.C. 701a makes it clear that the Congressional statement of policy as to Federal participation *is expressly restricted* to improvements "for flood control purposes". This limitation to "flood control" or "flood control purposes" appears in 33 U.S.C. 701a three times. Neither in 33 U.S.C. 701a-1 nor elsewhere is there anything which would lend support to the assertion that the language quoted or cited by petitioners from 33 U.S.C. 701a has any applicability to purely power projects.

It cannot be too greatly emphasized, first, that, of the 11 dams included in the Roanoke River Basin plan, only Buggs Island and Philpott—the two specifically authorized for Federal construction—have any significant aspects of flood control; and, second, that *the Roanoke Rapids project*

is a purely power project which has in it no element of flood control whatever. (Ex. 1, Table 35, I, 158-9).

Reference to the text of 33 U.S.C. 701b makes it clear that the portion of such provision which Interior has paraphrased is expressly limited to *Federal* "investigations and improvements"; and that the primary purpose of this provision was merely to assign certain "Federal investigations and improvements" to the Department of the Army and certain other "Federal investigations" to the Department of Agriculture.[10]

Petitioners' argument also refers to the "benefit-to-cost ratio" of the general plan and of individual projects in the plan and suggests that such ratios, and presumably the development of the general plan and projects in the plan, may be adversely affected by non-Federal development of any one site.

It should be pointed out, first, that the individual ratios of the significant flood control projects—Buggs Island and Philpott—in each case exceed unity. And the fact is that Congress, in considering the authorization of projects in the Act of 1944, indicated its concern only with the feasibility of the individual or independent projects considered. It is highly significant that, in making his statement on the Roanoke River Basin projects to the Senate Subcommittee considering the proposed legislation, the spokesman for the Corps of Engineers did not think it of sufficient interest or importance even to mention the benefit-to-cost ratio of the general plan. The only benefit-to-cost ratios given by him, and the only ones about which he was asked, were the individual ratios for Buggs Island and Philpott. See Hearings on H.R. 4485 before Subcommittee of Senate Committee on Commerce, 78th Cong., 2nd Sess. (1944), pp. 23-25, 28-30. Neither of these would be jeopardized in any way by non-Federal development of Roanoke Rapids.

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[10] This same omission of the limitation to "Federal investigations and improvements" is made by Interior in its paraphrase of 33 U.S.C. 701 a-1. (See Int. Br. 195-6).

But, even if we were to consider the benefit-to-cost ratio of the general plan to be pertinent to the issues presented in this case, we submit that, on analysis, it becomes clear that VEPCO's proposed development at Roanoke Rapids will not adversely affect such ratio. We discuss below at greater length the basis of the pertinent "benefits" and "costs" and benefit-to-cost ratios commonly used by the Corps of Engineers. (See pp. 53-59, *infra*.) It is sufficient here to point out that any attempt to compute a true composite benefit-to-cost ratio, in the context of a general plan of development which includes both Federal and non-Federal projects, must recognize that non-Federal development of a particular project will result in a cash realization to the U.S. Treasury in the form of Federal taxes and a saving to the U. S. Treasury in not having to furnish capital at rates which are less than those set in the public financial markets to reflect the risks involved—both of which elements may properly be considered as part of the composite "benefits" of such general plan. Where, under such circumstances, headwater benefit payments are paid by the non-Federal project (because of benefits accruing to it from a Federal project in the plan), such payments also must properly be included as part of the composite "benefits" of the plan.

This is neither academic nor insubstantial. In this case it is estimated that $1,000,000 or more, in the form of Federal income taxes (Ex. 62, IV, 50), and something like $250,000, in the form of headwater benefit payments (I, 56-7), will be paid to the U. S. Treasury annually if VEPCO develops Roanoke Rapids—neither of which would be received under Federal development. Further, the U. S. Treasury would be relieved of the need to advance $27,000,000, at what petitioners have assumed would be a 2% rate of interest to finance Federal construction of a project which the public market evaluates as a 6% risk. If, as is proper, these items are considered part of the composite "benefits" of the plan, there would be no modification of the composite

ratio by reason of VEPCO's development of Roanoke Rapids.

Nor can it be said that the VEPCO project will interfere in any way with flood control or navigation or any physical aspect or operation of the Federally developed projects—Buggs Island and Philpott—or of the plan as a whole. (R. 366). The Chief of Engineers has reported to the Commission that the VEPCO project is consistent with the comprehensive plan for development of the water resources of the Basin; and that such project has his complete approval, subject only to inclusion of conditions (which were so included) in the license to protect various aspects of the public interest. (See Ex. 8, I, 191-6). Finally, the Commission has found, on the record, that the VEPCO project "is in harmony with the approved comprehensive plan and is 'best adapted to a comprehensive plan' as that language is used in Section 10(a) of the Federal Power Act." (I, 68).[11]

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[11] Compare the testimony of Col. de Luccia, then Chief of the Bureau of Power of the Commission:

"Q. In your reports upon an application for license such as the pending application for project 2009, do you consider and report upon the adaptability of the proposed project to the general plan of development of the particular river basin within which the project would be located?

A. We certainly do. This is one of the first matters to which we direct our attention, as I have just indicated.

Q. In your opinion must the several projects in a river basin which are mentioned in a comprehensive plan proposed by the Army Engineers be developed by only one agency, whether that agency be public or private, federal or non-federal, in order to achieve the full benefits through operation which the comprehensive plan is designed to achieve?

A. Not necessarily. As a matter of fact, we have consistently regarded the Federal Power Act, particularly through the license conditions and requirements, as providing for non-federal construction either by state or municipal agencies, REA Cooperatives, or privately owned power companies, as protecting every public interest for which the Congress has assumed any responsibility and as providing for full (cont'd)

It should also be observed that, here again, if the "single package" argument of petitioners were valid—i.e. that Congress intended to "adopt by law" and commit itself to Federal construction of all 11 projects — there would have been no reason or purpose whatever for the specific authorization for the construction of Buggs Island and Philpott, or for ever-returning to Congress for like authorization of any other unit in the general plan, as was done in the case of Smith Mountain on the Roanoke and the comparable and even stronger case of Hartwell on the Savannah River.

Lastly—apart from the lack of any valid foundation for these arguments of petitioners or the fact that such arguments are wholly at variance with the language actually used in Section 10 and with the procedure actually followed in the Smith Mountain and Hartwell cases—we believe that it is impossible to read the legislative history of the relevant provisions of the Flood Control Act of 1944 and come away with any view other than that Congress considered Buggs Island and Philpott, on their own bottoms, as flood control projects; determined to authorize them as such; did not intend in any way to commit itself to Federal construction of the other 9 dams; and, indeed, to the extent that such other dams were discussed at all, indicated considerable doubt whether the power projects could ever be constructed by the Federal Government.

b. The legislative history shows that Congress neither authorized Federal construction nor intended to

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[11] (Continued)

coordinated operation of all projects over which the United States has control.

Further, the Commission through its licensing control and in cooperation with the Corps of Engineers, the Bureau of Reclamation and the other agencies and departments of the Federal Government can assure that operation of projects under license will be fully coordinated with federal projects to realize completely the best and most comprehensive use of a water resource."
(IV, 195-6)

preclude Commission jurisdiction over the licensing of a non-Federal project at Roanoke Rapids.

It is of primary importance to bear in mind that, of the projects included in the Corps of Engineers' plan, only Buggs Island and Philpott—the only two projects authorized for Federal construction—are to any substantial extent for flood control. This is clear, beyond contradiction, from the face of the Engineers' report in House Document No. 650. That report shows that the remaining 9 projects of the general plan would have as either their sole or their predominant purpose the generation of electric power. In particular, the report shows that the Roanoke Rapids project does not involve any purpose to provide flood control or to improve navigation or any other purpose except the generation of power. (See Ex. 1, Table 36, I, 158-9; IV, 140; R. 575, 749, 756; and see Commission's findings, I, 44, 51, 53-4).

On the other hand, the legislative history of flood control enactments and, in particular, of the Act of 1944, clearly indicates that in such legislation Congress intended to confine Federal construction to dams and reservoirs having as their primary purpose improvement for flood control or navigation and to exclude dams and reservoirs devoted solely or primarily to power.[12]

Thus, in discussing the 1936 flood control legislation, the Report of the Senate Committee on Commerce stated:

> "The committee found it advisable to exclude from the bill certain reservoirs included in H.R. 3455, most of which are associated with power devel-

[12] In the following extracts from the legislative reports and statements of Congressmen, particular attention is directed to the repeated emphasis on the concern with individual dams and reservoirs. As we have pointed out, this emphasis is directly contrary to what has been the basic hypothesis of petitioners' "single project" or "single package" argument — i. e. the assertion that Congress was concerned only with general plans as a single project and not with individual dams or reservoirs, as projects included in a comprehensive plan.

opment, since the inclusion of such reservoirs in a bill devoted to flood-control measures would not appear appropriate." Sen. Rep. No. 1963, 74th Cong., 2nd Sess., p. 2.

A similar statement appears in the Report of the House Committee on Flood Control dealing with the 1938 flood control legislation:

> "All reservoirs heretofore adopted and all reservoirs authorized in the pending bill provide primarily for flood control. Only two of the dams in the bill provide for the development of power. These are the Denison on the Red River, which is primarily for flood control, but in accordance with the policy where power and flood control can be combined, provision is made for power at the Denison Dam along the Red River. Four states are affected. The other multiple reservoir which provides for both flood control and power is on the New River in West Virginia and known as the Bluestone Reservoir." H.R. Rep. No. 2353, 75th Cong., 3rd Sess., pp. 5-6.

This same preoccupation with flood control, as distinguished from power, is evident in the consideration given to the 1944 Act, which is directly involved in this case. Thus, in its introduction, the Report of the House Flood Control Committee on the 1944 legislation first refers to the fact that the 1941 report of the Committee "stressed the need for orderly development of the national program for flood control and recommended additional authorizations for the continuation of flood protection work". Thereafter, the Report discusses at length the flood disasters which had taken place throughout the country and emphasizes the need for "authorization" of additional projects for "flood control". H.R. Rep. No. 1309, 78th Cong., 2nd Sess., pp. 1-4.

Statements on the floor show this same preoccupation with flood control and the specific intention and understanding that the 1944 legislation would not authorize purely

power "projects", "dams" or "reservoirs". The remarks of Rep. Whittington, Chairman of the House Committee on Flood Control and the manager of the bill in the House, are of particular significance in this respect:

> "MR. CANNON of Missouri. And it [the 1944 legislation] in no way affects any proposal for the development of power?
>
> MR. WHITTINGTON. There are no facilities and no power projects authorized in this bill. The general law will obtain. If a reservoir is authorized and if the Federal Power Commission thinks that a penstock should be installed, and the Secretary of War agrees with it, there will be a penstock installed in the reservoir. But *no power project is authorized* in the bill. * * *
>
> In further answer to the gentleman's question, we have repeatedly stated during the debate that *no project, reservoir or dam, or other improvement is embraced in this bill unless it is primarily for flood control.* If power can be developed as an incident, or if reclamation can be provided, they are cared for in the bill. * * *
>
> Under leave to extend, as I stated, none of the dams authorized in the pending bill provide primarily for the generation and distribution of power. *The dominant interest in all of the dams is flood control.* Such has been the case in previous flood-control bills. There are some dams authorized where power is incidental. In such cases where the report so states, provision is made for power, but *there is no provision generally for power in the reservoirs authorized."* 90 Cong. Rec. 4199, 4202. (Emphasis added).

While the foregoing statements were made prior to the inclusion of the Roanoke River Basin provision in the bill under consideration, it is clear that the views expressed by Congressman Whittington were intended to

apply generally to the 1944 flood control legislation and there is nothing in the later legislative history to indicate that there was any modification of these views when the House voted to adopt the final bill.

Moreover, with specific reference to the projects in the Roanoke River Basin, there is the additional unequivocal evidence that the Senate Committee's intention and understanding, from the standpoint of authorization or adoption of Federal construction of projects, was that the 1944 legislation was concerned only with Buggs Island and Philpott. Thus, the Senate Report contains a "Summary of Projects In The Bill", listing the projects authorized in the Bill as passed by the House (which did not include the Roanoke River projects) and then goes on to state (Sen. Rep. No. 1030, 78th Cong., 2nd Sess., pp. 29-30):

> "The War Department projects added by the proposed amendments of the committee [which amendments included the provisions relating to the Roanoke River Basin as they finally appeared in the 1944 Act] and discussed previously in this report are tabulated below:
>
> | River or Basin | Authorization |
> | --- | --- |
> | • • • | • • • |
> | Roanoke River | $36,140,000" |
> | • • • | • • • |

The quoted statement is to be compared with the previous discussion in the Report which gives the estimated cost of construction of all 11 dams in the plan as $124,000,000 and the estimated cost of construction of Buggs Island and Philpott as being the amount quoted, $36,140,000. (*Id.* at p. 8). *Thus, it is obvious that the only "projects added", by the Senate Committee's inclusion of the Roanoke River provisions, were Buggs Island and Philpott*—and, incidentally, that the Senate Commit-

tee used the term "projects" to refer to the individual projects at Buggs Island and Philpott.[13]

Moreover, the intention to authorize Federal construction of only Buggs Island and Philpott, the preoccupation with flood control and the expressed doubts in the Senate Hearings, as to whether construction by the Federal Government of dams for power purposes only could ever be authorized, appear in the Hearings before the Senate Subcommittee of the Committee on Commerce dealing with the 1944 legislation. The following colloquy took place between members of the Subcommittee and Col. Goethals, the representative of the Corps of Engineers presenting the facts respecting the various projects under consideration. After describing the general plan for the Roanoke River Basin and stating that the recommendation was that the general plan be approved and that Buggs Island and Philpott be authorized for Federal construction, Col. Goethals was asked:

> "SENATOR OVERTON. Are those the only two reservoirs that are recommended to be authorized in this bill?
>
> COLONEL GOETHALS. Those are the only two recommended to be authorized in this bill. The report recommends that Congress approve the general plan of development, but at this time authorize only those two reservoirs in the amounts stated.
>
> SENATOR BURTON. Do I understand the amount for those two is $36,000,000?
>
> COLONEL GOETHALS. Yes, sir; $36,140,000. * * *". Hearings on H.R. 4485, 78th Cong., 2nd Sess. (1944), p. 24.

[13] The foregoing is to be contrasted with petitioners' statement that the Chairman of the Senate Committee understood "that the entire river basin development" (which it was estimated would cost $124,000,000) "was intended as a Federal undertaking" and that "There was nothing in the Senate Report (No. 1030, 78th Congress, 2d Session) that could be interpreted as transmitting any different idea to the Senate." (Int. Br. pp. 107-8).

Thereafter, Col. Goethals presented a statement dealing with the Yadkin-Pee Dee River Basin and a recommendation, similar to that for the Roanoke River Basin, that a general plan to be approved and one specific project (Wilkesboro) be authorized for construction. The following colloquy then occurred:

> "SENATOR OVERTON. It is my off-hand opinion that we would not be justified in authorizing a project purely for power. It must have as a foundation flood-control benefits in some substantial amount. What have you to say about that, General Reybold?
>
> GENERAL REYBOLD [Chief of Engineers]. We do have flood control benefits in important amounts in these initial projects on the Roanoke and Yadkin-Pee Dee Rivers.
>
> SENATOR OVERTON. Yes; you have it. I think that there should be a statement of the estimate of the flood-control benefit. A very serious question presents itself for our Congress to construct a dam solely for purposes of power, that has no relation to flood-control or navigation.
>
> SENATOR BURTON. It would be helpful Mr. Chairman, if in the statement there could be shown what proportion of this ratio is related to flood-control and what proportion to power.
>
> SENATOR OVERTON. That is what I want. That is what I want done in each one of the projects—how much of the benefit is flood-control, and how much is power." *Id.* at pp. 29-30.

The Hearings state (at p. 30) that the information referred to — i.e. the benefit-to-cost ratios requested by Senator Overton, the Chairman of the Subcommittee, for "each one of the projects" — was then given for Buggs Island, Philpott and Wilkesboro, being the projects proposed to be authorized for Federal construction. But it is

highly significant that *no such information was furnished with respect to either the general plan or any of the other projects in the Roanoke River Basin.* The reason for such omission obviously was that all concerned understood that Congress was being asked to authorize only the Buggs Island and Philpott projects and not the general plan or any other of the 11 projects in the Roanoke River Basin.[14]

In considering the legislative history, it is also worthy of note that the Corps of Engineers—who were most directly concerned, who presented the legislation to Congress and discussed it in the hearings, and who are most familiar with every stage of the legislative consideration—have stated time after time their understanding that Congress authorized Federal construction of only Buggs Island and Philpott and never meant to preclude non-Federal development of Roanoke Rapids under the Federal Power Act, and have reported that construction of the proposed project by VEPCO is entirely consistent with Congressional intent and policy. (See, e.g., the Hearings quoted in the decision of the Commission's Chief Presiding Examiner, III, 1065 *et seq;* and see Ex. 8, I, 191).

We submit that, with respect to the projects in the Roanoke River Basin, the foregoing legislative history shows (a) that Congress intended a substantial distinction between the "authorization" of specific named projects and mere "approval" of a general plan; (b) that Congress intended to and did authorize Federal construction of only the Buggs Island and Philpott projects; (c) that Congress intended that Federal construction should be con-

[14] In addition to the legislative history already cited, to show that Congress was concerned primarily with flood problems and flood control reservoirs and intended to confine its authorization of power development to such power as might be available incidentally at dams essentially for flood control, there is clear evidence in the discussions of Section 5 of the 1944 Act that Congress did not intend that such legislation be regarded as authorizing or approving, under the guise of flood control, the setting up of competitive public power systems. See Sen. Rep. No. 1030, 78th Cong., 2nd Sess., p. 3; 90 Cong. Rec. 4122, 9287.

fined to projects primarily for flood control and that projects primarily or solely for power should not be Federally constructed; (d) that members of the Senate Subcommittee having the matter under consideration expressed grave doubts as to the authority of the Federal Government to construct projects purely for power purposes and made clear their understanding that the Act would not authorize any such construction or imply any prospect of such authorization or construction in the future; (e) that, therefore, Congress did not intend its mere "approval" of the general plan to represent a preempting of all of the important Roanoke River Basin sites for development by the Federal Government; and (f) that, in particular, Congress had no intention of precluding the Commission from considering and granting an application for non-Federal development of a power project at Roanoke Rapids.

c. **By its "approval" of the general plan, Congress intended merely to approve the physical aspects of the plan—leaving open the question as to who might develop particular sites—and thus "to insure that waterway developments by private enterprise would fit into a general plan for the full utilization of the water resources" of the stream.**

The key to understanding the significance of the Congressional "approval" of the general plan for the Roanoke River Basin, and the explanation for the procedure of approving general plans while authorizing Federal construction of only specific named projects included in the plans, is to be found in the historical background of the Roanoke River Basin provision of Section 10. The general plan approved by Congress in that section was, of course, the plan "recommended by the Chief of Engineers in House Document Numbered 650, Seventy-eighth Congress, second session".

The submission of such report by the Corps of Engineers had been specifically requested by Congress as a "review" of House Document No.65, 74th Cong., 1st Sess.,

the original "308" report on the Basin. (Ex. 1, pp. 1, 12-13, I, 135, IV, 28). An understanding of the purpose of House Document 650, the intent of the Corps of Engineers in submitting such report, and the significance of Congressional approval of the general plan, so submitted, therefore requires an understanding of the purpose and significance of the "308" reports.

The purpose and policies governing "308" reports are set forth in a joint report, including recommendations, of the Chief of Engineers and the Federal Power Commission, which report was printed as House Document 308, 69th Cong., 1st Sess.[15] And House Document 308, itself, shows conclusively that, from the outset, it was contemplated that a general plan for development of a particular stream might include both private and Federal projects. Thus, in discussing the purposes of the proposed "308" investigations and reports of the Corps of Engineers, House Document 308 states (at p. 4) that they should include:

> "the preparation of plans for improvement to be undertaken by the Federal Government alone *or in connection with private enterprise*, or to secure adequate data to insure that waterway *developments by private enterprise* would fit into a general plan for the full utilization of the water resources of a stream". (Emphasis added).

In this light it becomes apparent that, in submitting a "308" report on a general plan for comprehensive development of the water resources of a stream, the Corps of Engineers was primarily concerned with the physical aspects of the plan and not with who was to construct the

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[15] The making of that report to Congress was directed by Section 3 of the Rivers and Harbors Act of 1925 (43 Stat. 1186, 1190); and Congress, in Section 1 of the Rivers and Harbors Act of 1927 (44 Stat. 1010, 1015), directed the making of the "308" surveys in accordance with the recommendations of House Document 308.

particular projects; and, similarly, that, in approving such a general plan, Congress merely intended to approve the physical aspects of the plan—leaving open the question whether particular projects might be developed by Federal or non-Federal construction—and thus to make it possible "to insure that waterway developments by private enterprise would fit into a general plan for the full utilization of the water resources" of the stream. It is particularly significant, in this respect, that a proposed non-Federal development in such a region can be permitted under Part I of the Federal Power Act only if, among other things, it is found to be the project "best adapted to a comprehensive plan" for improving or developing the water resources of the region (Sec. 10(a), 7(a)). Thus it can be approved by the Commission only if it will "fit into" the approved general plan.

As we have pointed out, the Chief of Engineers has officially reported to the Commission that the VEPCO project is consistent with the comprehensive plan for development of the water resources of the Basin (Ex. 8, I, 191); and the Commission has found, on the record, that the VEPCO project "is in harmony with the approved comprehensive plan and is 'best adapted to a comprehensive plan' as that language is used in Section 10(a) of the Federal Power Act." (I, 68).

B. THE COMMISSION'S LETTER OF MAY 3, 1944, COMMENTING ON THE CORPS OF ENGINEERS' PLAN, DID NOT DIVEST THE COMMISSION OF JURISDICTION TO CONSIDER AND GRANT THE VEPCO APPLICATION.

In response to a request from the Chief of Engineers for comments on the Corps of Engineers' plan for development of the Roanoke River Basin, the Commission transmitted its views in a letter dated May 3, 1944, which appears in House Document No. 650, 78th Cong., 2nd Sess. (Ex. 1, pp. 2-4, I, 138-143). In its letter, the Commission made several suggestions as to physical modifications of certain of the projects and as to possible additional sites

in the Roanoke River Basin which "merit investigation" and then went on to state (Ex. 1, p. 4, I, 142):

> "Based upon the consideration given hereinbefore, and upon careful review of the reports of your Department, the Commission concurs in the conclusion of the Board of Engineers for Rivers and Harbors that the comprehensive development of the Roanoke River Basin, in general accordance with the plans prepared therefor by the district engineer consisting of eleven dam and reservoir projects with power, is desirable and that the Buggs Island and Philpott projects would constitute a desirable initial step in the development of the Roanoke River Basin."

Petitioners contend that, by virtue of such letter and Section 7(b) of the Federal Power Act, the Commission divested itself of jurisdiction to consider and grant the VEPCO application for a license to develop Roanoke Rapids.

In our view, this contention is fallacious in both its premises and its conclusions.

1. The Commission's Letter of May 3, 1944, is Concerned only with the Plan in the Physical Sense and not with who Shall Construct the Projects Covered by the Plan.

In so far as it purports to state the intention of the Commission in its letter of May 3, 1944, petitioners' contention rests on two assumptions, both of which we believe to be false.

Thus, petitioners assume, first, that the Corps of Engineers' plan in House Document 650, without question and without qualification, would require construction of all of the projects referred to therein by the United States. As we have pointed out, the report in House Document 650 was submitted in response to a Congressional request for a "review" of the prior "308" report; and such reports are

primarily concerned with the physical aspects of the plans reviewed. It was merely as part of that concern, that the Chief of Engineers included the statement in House Document 650 that, "to safeguard the interests of navigation and flood-control," such projects should be constructed and operated "under the direction of the Secretary of War and the supervision of the Chief of Engineers". It is perfectly clear that the stated objectives can just as easily be achieved by private construction and operation under Federal supervision, including that of the Chief of Engineers, as by Government construction and operation.

In this connection it is pertinent to note that the Federal Power Act prescribes just such supervision, viz., through the provisions of Section 4(e), requiring approval by the Chief of Engineers and the Secretary of the Army of the plans of a non-Federal applicant for a project affecting navigation, and the provisions of Sections 11, 12, and 18, which empower the Chief of Engineers and the Secretary of the Army to supervise and control the operation of any facilities or other aspects of the project affecting navigation. See also Section 10(c) of the Act and R. 743-4, 1910-14.[16]

The second assumption made by petitioners is that the Commission, in its letter, meant to concur not only as to the physical units or projects of the plan, but also in what petitioners have asserted to be a proposal in the Corps of Engineers' report for Federal construction of all the projects covered by the plan. There is nothing whatever in the Commission's letter to support that assumption. On its face, the letter is nothing more than a concurrence as to the

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[16] As a matter of fact, in this case the Chief of Engineers has stated that VEPCO's proposed project is satisfactory to him, subject only to the attaching of certain conditions to the license, which conditions have as their principal purpose the safeguarding of navigation downstream from Roanoke Rapids and of the flood-control features of Buggs Island and Philpott (Ex. 8, I, 191-196) and such conditions have actually been embodied in the license granted VEPCO. (I, 71-7).

physical units of the plan, subject to certain suggested modifications. There is no statement or suggestion in the Commission's letter as to who should build the projects. Indeed, the letter relates only to the physical elements of the projects, the resulting power output and additional sites which should be considered for complete development of the Roanoke River Basin. If there were any doubts in this respect, it would seem that the Commission is the best judge of what it meant in its letter; and the Commission obviously has not regarded the letter as relating in any way to the question of who should construct the projects.

Accordingly, we submit that there is no warrant whatever for petitioners' basic premises that the Corps of Engineers' report unequivocally called for Federal construction of all 11 projects or that the Commission, by its letter of May 3, 1944, meant to concur in any such aspect of the report, even if it were implied, or to commit itself to the view that all 11 projects should be constructed by the United States.

2. The Commission's Letter of May 3, 1944, could not, in any Event, Represent a Conclusive Finding under Section 7(b).

Apart from the question as to what views the Commission intended to express in its letter of May 3, 1944, petitioners' contention includes a further assumption which we think is untenable. That is, they argue that the letter represented a conclusive finding by the Commission under Section 7(b) of the Federal Power Act[17] and completely precluded the Commission's consideration of the VEPCO applica-

[17] Section 7(b) provides:

"Whenever, in the judgment of the Commission, the development of any water resources for public purposes should be undertaken by the United States itself, the Commission shall not approve any application for any project affecting such development, but shall cause to be made such examinations, surveys, reports, plans, and estimates of the cost of the proposed development as it may find necessary, and shall submit its findings to Congress with such recommendations as it may find appropriate concerning such development."

tion. As has already been pointed out, the Commission's letter did not indicate any view as to who should develop the Roanoke Rapids project, and *a fortiori* could not have been intended as a finding under Section 7(b).[18]

But, quite apart from the Commission's intention in that respect, it is clear that a conclusive finding under Section 7(b)—i.e., one which is binding on any particular applicant—can be made only in connection with consideration of an application for preliminary permit or license and only after a hearing at which the applicant and interested parties have had an opportunity to present evidence and argument.

A mere reading of Section 7(b) shows that it is at the time an application is denied (by reason of a finding under Section 7(b)) that it must be the judgment of the Commission that the development of the water resources involved should be undertaken by the United States itself.

That findings to be made by the Commission under Section 7(b) of the Federal Power Act can be made only in connection with the Commission's consideration of an application for preliminary permit or license is all the more clear when one takes into account the fact that in its original form, prior to the amendments of August 26, 1935, Section 7, though in the pertinent respect containing essentially the same subject-matter, was not subdivided into (a) and (b). Obviously the intent is that, "*whenever*", *in connection with its consideration of an application for preliminary permit or license,* it is the judgment of the Commission that the development of the project applied for "should be undertaken by the United States itself, the Commission

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[18] It should also be noted that under Section 7(b), when it is desired to make a finding for Federal construction, the Commission, after "such examinations, surveys, reports, plans, and estimates of the cost of the proposed development as it may find necessary", must "submit its findings to Congress with such recommendations as it may find appropriate". In this case, the Commission has submitted nothing whatever to Congress.

shall not approve" the application. In short, this is merely one of the several requirements imposed by Section 7 upon the Commission in its consideration of applications for preliminary permits or licenses. [19]

Thus, even if, contrary to the facts in this case, the Commission had at an earlier time expressed an opinion that the water resources at Roanoke Rapids should be developed by the United States, a finding anew, with opportunity for the applicant to be heard, would have had to be made when Section 7(b) came into play in connection with VEPCO's application for a license. And, manifestly, the interests of justice would not have been served if, under such circumstances, the Commission had not been entitled to reach a different judgment.

A contrary conclusion, as to the meaning of Section 7(b), which in this case would have foreclosed VEPCO completely without a hearing on the issue raised under Section 7(b), would create a very substantial question of due process. Such an outcome would be wholly unnecessary and unwarranted, for, under the statutory scheme, the Commission was, in this case as in all others, completely free and indeed *was required*—after opportunity for presentation, and after consideration, of evidence and argument—to determine whether the license should be granted or whether, instead, it should recommend that development of the project "should be undertaken by the United States itself."

In contrast with the suggestion by petitioners, that the Commission's letter of May 3, 1944, represents an *ex parte* determination, under Section 7(b), which is binding on all interested parties, the procedure which has been followed in this case—in which one of the specific issues has been whether an affirmative recommendation should be made under Section 7(b)—protects the interests of both the

[19] In 16 U.S.C. 800, which contains the codification of Section 7 of the Act, the caption is "Preferences in issuance of preliminary permits or licenses".

United States and the applicant. By such procedure, the Commission's determination has been based on a record in which that issue has been thoroughly explored, with opportunity given not only to the applicant but to petitioners and to all others interested, to introduce pertinent evidence and argument. Petitioners did, in fact, vigorously address themselves to that issue, by the introduction of evidence at the hearings and in argument to the Commission. On the basis of the record so made, the Commission found (I, 68):

> "The record in this proceeding does not provide a proper or sufficient basis for judgment or a finding under Section 7(b) of the Act that development of the water resources at Roanoke Rapids should be undertaken by the United States itself or for the submission of such findings and a recommendation to Congress to such effect, as provided in such section."

While petitioners challenged the Commission's views as to the meaning and effect of the May 3, 1944, letter and the interpretation of Section 7(b), they made no attempt in the Court of Appeals to argue that the evidence introduced at the hearings required a contrary finding.

C. VEPCO'S DEVELOPMENT OF ROANOKE RAPIDS IN ACCORDANCE WITH A LICENSE ISSUED UNDER THE FEDERAL POWER ACT WOULD NOT BE "UNJUST OR UNREASONABLE"; WOULD NOT DEPRIVE THE UNITED STATES OF HUGE POWER BENEFITS; AND WOULD, IN FACT, FURTHER THE PUBLIC INTEREST AND THE GENERAL WELFARE.

Finally, petitioners argue that it would be "unjust and unreasonable" to permit non-Federal development of the Roanoke Rapids site. The simple answer to this argument may well be that it should more properly be addressed to Congress than to this Court.

However, treating the argument as one of statutory construction, we submit that its premises and its conclusion

are false; and that they are completely contradicted by the evidence in the record and the findings of the Commission.

As a basis for this argument, petitioners assert that the power capacity of Roanoke Rapids depends to a great extent on the Government's development at Buggs Island and that "the net power benefits" of "in excess of $1,500,000 per year" at Roanoke Rapids are largely "the fruits of the Government's investment at Buggs Island" (Int. Br. 118, 122); that the grant of the license to VEPCO involves "the surrender of huge potential power assets of the United States" (Int. Br. 44); and "that the United States would be deprived of over $62,500,000 in net power benefits over the period of the license." (Int. Br. 187). None of these statements is supported by the record. Each of them can be shown to be directly contradicted by the facts in the record and the findings of the Commission.

1. The Only Benefits which Federal Development at Buggs Island could Contribute to the Development at Roanoke Rapids would be an Increase in Energy Output, with an Annual Value of About $250,000.

The question of how much of the benefits or value of Roanoke Rapids would be derived from Buggs Island is dealt with extensively in the record. The overwhelming weight of the evidence is that Buggs Island would contribute no capacity value whatsoever to the proposed development at Roanoke Rapids; that such capacity would be no more or less than 91,000 kw, whether under natural stream flow conditions without the Buggs Island reservoir or under such regulation of stream flow as might be provided by Buggs Island; that the maximum benefits which could be contributed to Roanoke Rapids by Buggs Island would be to permit Roanoke Rapids to increase its average annual energy output by some 70,000,000 kwh; and that the average annual value of such increased output of non-firm energy would be about $250,000 (II, 613; IV, 96-97, 99, 162-3; R. 1889; and see Exs. 15 and 28, II, 582-3.) The Commission specifically so found (I, 55-62) on the basis of

what was not only substantial evidence, but also the overwhelming weight of the evidence introduced on the point.

2. VEPCO's Development of Roanoke Rapids will not Deprive the United States of any Power Benefits Whatever and will not Lessen the Power Benefits of the General Plan.

Petitioners' statement, that the grant of a license for the proposed VEPCO development at Roanoke Rapids would deprive the United States of over $62,500,000 of net power benefits over the period of the license, also is directly contradicted by the facts in the record.

The figures used by petitioners are somewhat difficult to trace and even more difficult to support. The figure of $62,500,000 appears to represent the difference between the $75,000,000, which petitioners refer to as the net power benefits of Roanoke Rapids over a 50-year period, and the aggregate headwater benefit payments of $12,500,000 ($250,000 per year over the 50-year period) which, it is assumed, VEPCO would pay to the United States.

The $75,000,000 figure appears to be derived from Exhibit 54 (I, 223). This exhibit, introduced by Interior, purports to represent an economic feasibility study of the Roanoke Rapids project in House Document 650 under present costs and to show excess yearly benefits over costs of $1,518,000. The witness introducing this exhibit stated that it had been prepared in something like an hour (I, 241); that he did not have all of the essential information he needed (I, 240); and that certain of the information used in preparing the exhibit had been obtained the preceding night over the telephone from someone else who did not appear to testify (I, 243, 245-6). The conclusions in the exhibit are, of course, at substantial variance with both those stated in House Document 650 and those relating to VEPCO's proposed development.

However, we are less concerned with the amount of the figure used than with the validity of the use which petitioners have attempted to make of the so-called net power

benefits. We believe that an analysis of the make-up of such net power benefits shows that the conclusions stated by petitioners in this respect are the result of sophistry and a materially misleading use of semantics.

The method generally used by the Corps of Engineers (followed, in principle, in Exhibit 54) in deriving benefit-to-cost ratios for Federal hydroelectric projects is to compare the "cost" of *Federal* construction and operation (generally based on 100% debt capitalization supplied by the U. S. Treasury at 2 to 3% and on no payment of taxes) as against the "benefits" or value of the power produced. The "benefits" are taken as equal to the cost of power produced at a *private* steam plant (which cost includes the cost of debt and equity risk capital in the capital markets, generally calculated at an over-all cost of about 6%, plus Federal, State and local taxes). Thus, for example, in Exhibit 54 the "*cost*" of Federal construction is based on 100% debt capital to be supplied by the U. S. Treasury at an interest rate of only 2% per year and on the payment of no taxes whatever. On the other hand, the "*benefits*" of the power produced, are based on the cost of power at a steam plant financed with private debt and equity capital with an over-all cost of about 6% per year and include relatively large amounts for taxes.[20]

In this light, it becomes apparent that the major portion of the excess of Federal-project "benefits" over the Federal "cost" results from two factors. First, the Federal project is not subject to the payment of the taxes that would be paid under private development of the same project (which taxes are included in measuring the value or

[20] These benefit-to-cost ratios are generally conceded to be arbitrary devices for measuring economic feasibility. (IV, 201). We raise no question here as to their use in comparing one Federal development with another. But the use of benefit-to-cost ratios in which cost is computed on the basis of Federal development and benefit is computed on the basis of private development, can have no validity as a measure of the power benefits which might be lost through private development and is wholly misleading.

"benefits" of the Federally produced power). Second, the U. S. Treasury furnishes capital in the form of 100% debt at an annual rate assumed by petitioners to be 2%, whereas the going rate in the public capital markets for the use of the money and the risks inherent in the *same enterprise* is a weighted average of approximately 6% for the necessary debt, preferred stock and risk-bearing common stock.[21]

In this case there may also be two other elements which contribute to the excess of Federal-project "benefits" over "cost". These are (1) the benefit which may result to the Roanoke Rapids project from the upstream development at Buggs Island, and (2) the value represented by the true economic advantage (i.e., the advantage shown by using the same basis in respect of taxes, cost of money, etc. for benefits and costs as, for example, in Exhibit 15 (II, 582)) which the proposed hydroelectric development would have over a steam plant designed to produce equivalent capacity and energy.

These are the four elements which make up all or virtually all of the excess (of power "benefits" over "costs") of which, petitioners assert, the United States would be deprived by reason of the grant of the license for the proposed VEPCO development. Petitioners' $75,000,000 figure (or any more precise figure), of the excess of benefits

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[21] Interior's request for findings submitted to the Commission included the following:

> "73. The great difference in the excess of benefits over costs and of the benefit-cost ratios as between the Government development and the proposed development by the Applicant is largely due to two factors:
>
> (a) The cost of money to the United States is approximately 2%, as compared with the estimated 6% to the Applicant.
>
> (b) In the annual charges of the Applicant's project are included large amounts for Federal and local taxes which constitute operating expenses and which the consumers must pay in their rates. The Government does not pay taxes to itself or to the local authorities, and therefore no such charges are passed on to the consumers." (Int. Reply Br. of October 1949 to the Commission, p. 104).

over cost of a Federal development at Roanoke Rapids, is derived from these four elements. With this background, it can be simply demonstrated that it is materially misleading, and unsupported by the facts, to assert that the United States will be deprived of *any* benefits which it would receive under Federal development.

In the first place, Interior's witness testified that the power produced at a Federally developed project would not be sold at its "value", but at its "cost", i.e., that the excess of power "benefits" over "costs" would not be realized by the U.S. Treasury, but rather by the limited group of preferred customers of the Federal project. (IV, 189-191). This, in itself, negates the assertion that the United States would be deprived of any "power benefits" by reason of the proposed VEPCO development.

But it is even more revealing to analyze each of the four elements which goes to make up the excess of benefits over cost.

(1) *Taxes*—Under Federal development and operation of Roanoke Rapids, no Federal income taxes and no State or local taxes would be paid. If VEPCO develops Roanoke Rapids, it is estimated that something like $1,000,000 in the form of Federal income taxes will be paid to the U.S. Treasury annually. (Ex. 62, IV, 50). Thus, in this respect, the U.S. Treasury will realize $1,000,000 annually *more* under VEPCO development than under Federal development. In addition, VEPCO would pay an estimated $304,000 annually in local property taxes (Ex. 15, II 582), which under Federal development would not be received by the treasuries of State and other local governments.

(2) *Cost of capital*—The annual over-all cost, in the free capital markets, of the money needed to finance an enterprise with the risks involved in the Roanoke Rapids project is at a rate of approximately 6%. This is the rate which VEPCO must pay. Under the assumptions made by petitioners, the U.S. Treasury would advance some

$27,000,000 at a rate of 2% to finance Federal construction of a project which the public market evaluates at a 6% risk. Since it can be fairly assumed that this same $27,000,000 could be invested by the U.S. Treasury in an enterprise of comparable risk, the simple fact is that the low assumed cost of capital under Federal development involves a Federal subsidy to the extent of the difference between the 2% and 6% rates. Whether such a subsidy is or is not justifiable is not here in question. The point is that the VEPCO development will actually save the U.S. Treasury the amount of this subsidy; and, more important, that it is grossly misleading to suggest that VEPCO's development of Roanoke Rapids will deprive the United States of that portion of the "net power benefits" of Federal development which is derived from the difference in the costs of capital used in computing "costs" and "benefits", respectively.

(3) *Contribution by Buggs Island to Roanoke Rapids*—As has been shown above, the overwhelming weight of the evidence and the findings of the Commission are that the only contribution which will be made by Buggs Island to Roanoke Rapids will be to make it possible for Roanoke Rapids to generate additional energy of an annual value of approximately $250,000. VEPCO will on this account be required to make annual payments to the United States, so that, here again, the U. S. Treasury will under VEPCO development receive annually monies which it would not receive under Federal development. Even petitioners appear to concede this when they deduct, from their claimed $75,000,000 of "power benefits", the headwater benefit payments to be made by VEPCO, and arrive at their figure of $62,500,000 as the "net power benefits" of which, they assert, the United States will be deprived by reason of VEPCO development (see p. 53, *supra*).

(4) *The true economic advantage of Roanoke Rapids hydro power over that which could be produced at a steam plant*—The record does show that, using like bases in com-

puting costs and benefits, there is a margin in favor of Roanoke Rapids hydro power over steam power. This margin is estimated in Exhibit 15 (II, 582) as $404,000 per annum, from which there should, however, be deducted the required annual headwater benefit payments (assumed to be $250,000), or a net amount of $154,000 annually. In contrast to the amounts represented by the three prior items discussed, we believe it might be argued with some validity that VEPCO's development at Roanoke Rapids will enable it to secure the net power benefits represented by this advantage. But, in appraising the significance of this, one must consider what happens to these benefits. The testimony is that under Federal development they will not be retained by the United States but will be passed on to the consumers of the Federal project (IV, 189-191). However, since VEPCO rates will be subject to regulation by both the State Corporation Commission of Virginia and the Federal Power Commission, it is obvious that under VEPCO development also these benefits will be passed on to the consumer.

In sum, under Federal development the U. S. Treasury will realize no benefits whatever, but will pass on to the consumers of the Federal project the amounts represented by the difference between the costs incurred, in respect of taxes, cost of capital and headwater benefit payments, under Federal as against VEPCO development. Under VEPCO development the U. S. Treasury (and, in the case of taxes, the State and other local governments) will actually *receive* (or, in the case of the cost of capital, *save*) the amounts represented by these three items. In either case the true economic advantage of Roanoke Rapids hydro will be passed on to the respective consumers.

It is true that the preferred consumers of a Federal project would realize substantial savings under Federal development. But these savings are the direct equivalent of the loss to the treasuries of the Federal and local governments as contrasted with what under private develop-

ment they would *receive* (in taxes and headwater benefit payments) and, in the case of the Federal Treasury, *save* (in not having to advance capital at less than its value). *The actual fact of the matter is that the real over-all benefits and costs are the same under either form of development.* We respectfully submit, therefore, that the facts directly contradict petitioners' argument that the VEPCO development will deprive the United States of net power benefits in an amount of $62,500,000 (or any other amount) over the 50-year term of the license.

3. VEPCO's Development of Roanoke Rapids will, in fact, Further the Public Interest and the General Welfare.

Apart from the discussion of the specific provisions of the 1944 Act and the significance of the Commission's letter of May 3, 1944, the major thrust of petitioners' arguments is that the granting of a license for VEPCO's development of Roanoke Rapids under the Federal Power Act would be contrary to the public interest and the general welfare. Indeed, some of the contentions lead to nothing less than the conclusion that all feasible hydroelectric projects should be developed by the Federal Government. We have addressed ourselves to the more important of these arguments; the invalidity of the remainder will, we think, be readily apparent to this Court. We think it important, however, to point out certain considerations which petitioners have either overlooked or disregarded:

First: Petitioners have completely overlooked or disregarded the fact that the Federal Power Commission can issue a license for private development under the Federal Power Act only after consideration of, and in compliance with, the standards of the Act, which have been designed to protect and further every relevant aspect of the public interest and the interests of the United States. Under the Federal Power Act, if the application is not consistent with such interests, it cannot be granted. Further, the Act provides for continuing jurisdiction and supervision to ensure

the continued protection of such interests by both the Federal Power Commission and the State regulatory commissions.[22] We see no warrant for the assumption that the Commission and the State Commissions will not fully carry out their responsibilities in these respects.

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[22] Licenses may be granted under the Act only where the project proposed is "best adapted to a comprehensive plan" for benefitting interstate commerce, water-power development and other beneficial public uses (Sec. 10(a)); and, as between various applicants (with priority given to States and municipalities), preference is given to the project "best adapted to develop, conserve, and utilize in the public interest the water resources of the region" (Sec. 7(a)). An application may not be granted, "Whenever, in the judgment of the Commission, the development of any water resources for public purposes should be undertaken by the United States, itself" (Sec. 7(b)). Where a project affects "the navigable capacity of any navigable waters of the United States," a license may not be issued until the plans have been approved by the Chief of Engineers and the Secretary of War (Sec. 4(e)).

An application may be granted only where the licensee agrees to accept all terms and conditions specified in the Act or prescribed by the Commission (Secs. 6, 10(g)). Such terms and conditions require that the licensee shall not make any substantial alteration in its project without the prior approval of the Commission (Sec. 10(b)); shall maintain the project in a condition adequate for purposes of navigation and efficient operation for the development of power and conform to all rules which the Commission may from time to time prescribe "for the protection of life, health, and property" (Sec. 10(c)); shall after 20 years maintain amortization reserves in amounts "accumulated in excess of a specified reasonable rate of return" (Sec. 10(d)); shall pay to the United States annual charges to be fixed by the Commission to reimburse the United States and prevent the realization of excessive profits (Sec. 10(e)); and shall pay such amounts as may be fixed by the Commission as reimbursement on account of any benefits received from other projects (Sec. 10(f)). Where the project is in navigable waters, the licensee may also be required to construct such locks or other structures approved by the Chief of Engineers and the Secretary of War as may be found necessary for the improvement of navigation (Secs. 11 and 12).

A licensee must also agree to maintain at its own expense such lights and signals as may be directed by the Secretary of War and such fishways as may be prescribed by the Secretary of Commerce, and must further agree that navigation facilities shall at all times be controlled by such regulations as may be issued by the Secretary of War (Sec. 18). Licensees which are public utilities must agree

Second: Early development of the water resources of the Roanoke Rapids site and the generation and distribution of the power to the people in an area where it is badly needed represent a major aspect of what will, in fact, further the public interest. VEPCO is ready, willing and able to proceed with such development immediately. The alternative suggested is Federal construction—which has not yet been authorized, which has not even been presented to Congress for authorization and which may never, and in our view can never lawfully, be authorized by Congress.

Third: It is not inappropriate to note that our economic system is still primarily one of private enterprise. Our announced National policy has been that the Federal Government will enter a field only where it believes that private enterprise, for one reason or another, is not able or willing to carry out what is considered to be a necessary and proper Federal objective. Conversely, it has been our National policy to encourage private enterprise in every field where, subject to adequate safeguards to insure the protection of the public interest, private enterprise is willing and able to do the job. This policy is reflected in Part I of the Federal Power Act, which (as the Federal Water Power Act) was

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[22] (Continued)
to abide by the regulations in respect of service to consumers, rates and charges set by the appropriate State Commission, or, in the absence of a State Commission, by the Federal Power Commission (Sec. 19). Where power is transmitted in interstate commerce, standards of service, rates and charges and the licensee's issuance of securities are all subject either to State regulation or, in its absence, to regulation by the Federal Power Commission (Sec. 20).

Full information relating to the plans of the applicant and to its compliance with all applicable State laws must be furnished to the Commission (Sec. 9) and, where a license is granted, construction must be commenced and actual operations begun within time limits prescribed by the Act and the Commission (Sec. 13).

Licenses may not be issued for a period in excess of 50 years (Sec. 6) and projects are subject to acquisition by the United States at the expiration of the license (Sec. 14) or, where "the safety of the United States demands it", at any time (Sec. 16).

enacted for the specific purpose of encouraging development by "private capital and enterprise" in the hydroelectric field. (See Sen. Rep. No. 180, 66th Cong., 1st Sess. (1919), p. 3).

In this case, private enterprise is able and willing to proceed with the development of a substantial water resource —a development which all agree is very much in the public interest and should be carried out by someone. Moreover, in doing that job, private enterprise will be subject to the safeguards of the Federal Power Act which have been designed to protect every aspect of the public interest.

Fourth: Aside from several billions of cost of projects under way, the cost of Federal hydro development for which there are authorizations or pending proposals amounts to many billions of dollars. It is perfectly obvious that the Federal Government cannot afford the tremendous financial commitments necessary to build all of such projects. Yet it seems fair to assume that the development of at least a major portion of such projects is in the National interest. Every dollar which the Federal Government puts into any one of these projects means a dollar less available for Federal construction of the remaining projects or for other purposes. Conversely, every project which is developed without Federal funds conserves Federal funds for the remaining projects or such other purposes. Thus private development contributes to the National interest, not only in the development of the particular project, but also in conserving Federal funds which then become available for another project or purpose which otherwise might never be built or served.

In the light of these considerations, even were we to assume the existence of an alternative of Federal construction, we submit that there can be no question but that private development of the Roanoke Rapids project under the Federal Power Act and a license from the Commission will further the public interest and the general welfare.

Conclusion

For the reasons stated, the judgment below should be affirmed.

Respectfully submitted,

HERBERT B. COHN

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